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In The

Supreme Court of the United States

October Term, 1942.

No. 282

GEORGE W. MASON and HAZEL B. MASON, his wife,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TO THE HON. HARLAN FISKE STONE, CHIEF JUSTICE OF THE UNITED STATES, and the ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, GEORGE W. MASON and HAZEL B. MASON, his wife, respectfully show:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

This cause involves a claimed deficiency in petitioners' income tax in the amount of $10,827.57 for the calendar year 1935 (R. 16).

Petitioner, George W. Mason (hereinafter referred to as "Taxpayer"), on September 7, 1933, entered into a contract with Kelvinator Corporation whereby he agreed to be employed by the latter as its general manager for a term of four years from October 1, 1933, the contract prescribing a fixed "rate of compensation" and certain "further compensation" (R. 10, 11, 15).

The fixed "rate of compensation" was provided for in paragraph "First," subdivision (2) of the contract, which reads as follows:

> "The rate of compensation shall be:
> '(a) Fifty thousand dollars ($50,000) per annum payable in equal semi-monthly installments.
> '(b) One thousand two hundred and fifty (1,250) shares of full paid stock of the corporation to be delivered on January 1, 1934, and quarterly thereafter to and including October 1, 1937' " (R. 11).

The "further compensation" was prescribed in the first sentence of paragraph "First," subdivision (3) of the contract, in the following provision:

> "The corporation further agrees as further compensation to Mason to *pay* him on January 15, 1935,

> 1936, 1937 and 1938, a *sum* equal to ten per cent (10%) of the net earnings of the preceding fiscal year, determined as hereinafter set forth after deducting therefrom an amount equal to five per cent (5%) upon the capital and surplus of the corporation determined as hereinafter set forth" (R. 11). (Italics ours.)

The contract, however, was not solely an employment contract, but contained provisions whereby the Corporation agreed "to sell" and Taxpayer agreed "to purchase" at a fixed price of $10.00 per share on January 15th in the years 1935 to 1938, inclusive, such a number of shares of stock of Kelvinator Corporation as could be purchased with an amount of money equal to the sum payable to Taxpayer as a bonus. Taxpayer was not required, however, to use the money received as a bonus to pay the purchase price of the stock and was not required to take his bonus in the form of a credit on such purchase price (R. 11).

The provision establishing such sale reads in part as follows:

> "The corporation agrees to *sell* and Mason agrees to *purchase* at ten dollars ($10.00) per share on January 15th of each year as above set forth a number of shares of fully paid stock of the corporation equal to the sum, if any, payable to Mason on such date pursuant to the preceding section of this paragraph (3)" (R. 11). (Italics ours.)

Without attempting to argue the facts in the case but to set forth in substance the general nature of the contract, it will be noted that throughout the remainder of the entire contract the payment of the cash bonus and the sale and purchase of the stock are treated as separate

undertakings, the provisions relative to the cash bonus specifically referring to the payment of sums of money. The words "pay" and "payments" are used in Subdivision First (3) and (5) (a) in reference to the cash bonus, while on the other hand the provisions relative to the stock in question specifically refer to the "sale" and "purchase" of "shares of such stock" (R. 11-13). Nowhere in the contract is the stock in question designated as compensation for services although the 1250 shares of stock given quarterly as compensation and not involved in these proceedings are specifically designated in the contract as compensation (R. 10-15).

The amount determined to be payable to Taxpayer in cash on January 15, 1935, as a bonus under the bonus provision of the contract was $49,891.69, which amount he reported as income (R. 10, 20).

Pursuant to the sales agreement contained in the contract, Taxpayer purchased 4989 shares of Kelvinator Corporation stock for $49,890.00, the fixed contract price, which sum was slightly less than the cash bonus (R. 10, 11, 20).

The Commissioner contended that there was no agreement to purchase stock at a price of $10.00 per share, but an agreement to accept such stock in partial payment for services rendered, and that Petitioners' income was measured by the fair market value of the stock at the date it was received. On that basis, the Commissioner contended that Taxpayer erred in reporting as income the cash bonus for $49,891.69, but in lieu thereof should have reported the market value at the time of receipt of the 4989 shares of Kelvinator Corporation stock, which stock Taxpayer purchased under the purchase provision of

the contract at the agreed price of $10.00 per share (R. 20, 21).

Petitioners contend that they were correct in reporting the cash bonus received as income, and that the only income which will result from the acquisition of the 4989 shares of Kelvinator Corporation stock which Taxpayer purchased will arise at the time of the disposition of such stock by Taxpayer, at which time Taxpayer's cost price for the determination of taxable gain or loss will be $10.00 per share, the agreed contract price per share which he paid for it (R. 21).

On appeal to the Board of Tax Appeals, the action of the Commissioner in determining a deficiency of $10,827.57 in Petitioners' income tax for the calendar year 1935 was affirmed (R. 23). On a motion for rehearing, the Board refused to permit Petitioners to introduce evidence relating to the circumstances and conditions surrounding the parties at the time the contract was made, in order to explain the real intent of the parties, and evidence as to the manner in which Kelvinator Corporation treated the transactions on its books and records and in its income tax return (R. 30). Such evidence is contained in affidavits set forth on pages 31 to 45 of the Transcript of Record. The determination of the Board of Tax Appeals was affirmed by the Circuit Court of Appeals for the Sixth Circuit.

II.

JURISDICTION.

A statement disclosing the basis upon which this court has jurisdiction is contained in subdivision II of the supporting brief following this petition, which subdivision II is hereby adopted and made a part hereof.

III.

QUESTIONS PRESENTED.

The proceedings at bar involve no disputed questions of fact, the facts being stipulated. The questions presented are the following:

(1) Is the taxable income of the Taxpayer measured by the amount of bonus compensation that he contracted to receive and did receive under his contract or is it measured by the market value of the shares of stock which he purchased from the Corporation in accordance with his agreement to purchase the same?

(2) Should Taxpayer's agreement with Kelvinator Corporation be construed so as to disregard portions of such agreement and render portions thereof useless and inexplicable?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioners show the following reasons for the allowance of the Writ:

(1) The Circuit Court of Appeals, in determining that the market value of the stock so purchased at the time of receipt constituted compensation for services, has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Omaha National Bank v. Commissioner (1935), 75 Fed. (2d) 434.*

(2) The Circuit Court of Appeals in construing Taxpayer's contract to provide that the market value of the stock purchased thereunder, at the time of receipt, constituted compensation for services has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the Board of Tax Appeals as to call for an exercise of this court's power of supervision.

(3) The Circuit Court of Appeals, in determining that the market value of the stock so purchased at the time of receipt constituted compensation for services, has decided an important question of Federal law, which has not been, but should be, settled by this court.

PRAYER.

WHEREFORE, your Petitioners pray that a Writ of Certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said court had in the case numbered and entitled on its docket, No. 8770, George W. Mason and Hazel B. Mason, his wife, Petitioners v. Commissioner of Internal Revenue, Respondent, to the end that this cause may be reviewed and determined by this court, as provided for by the statutes of the United States; and that the judgment herein of said court be reversed by the court, and for such further relief as to this court may seem proper.

Respectfully submitted,

COOK, SMITH, JACOBS and BEAKE,
VICTOR C. SWEARINGEN,
Counsel for Petitioners.

Dated July 31, 1942.

In The

Supreme Court of the United States

October Term, 1942.

No. .....

GEORGE W. MASON and HAZEL B. MASON, his wife,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURT AND BOARD BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit (pages 58-61 of the Record) is reported in *125 Fed. (2d) 540.* The opinion of the Board of Tax Appeals (pages 16-22 of the Record) is reported in *41 B. T. A. 1287.*

II.

JURISDICTION.

(1) The date of the judgment to be reviewed is January 14, 1942, and the date of the denial of a petition for rehearing in said cause is March 6, 1942. The time within which to file the petition for certiorari and supporting brief in this case has been extended by this court to and including August 5, 1942.

(2) The statutory provision which is believed to sustain the jurisdiction of this court is Sec. 240 (a) of the Judicial Code as amended, being 28 U. S. C. A., Sec. 347 (a), governing certiorari in the supreme court to review decisions of Circuit Courts of Appeals.

(3) This is a proceeding arising out of the determination by the Board of Tax Appeals of an income tax deficiency which determination has been affirmed by the Circuit Court of Appeals for the Sixth Circuit upon a petition for review. The decision of said Circuit Court of Appeals is erroneous as indicated in Subdivision IV hereof and certiorari should be granted for the reasons set forth in Subdivision V hereof.

(4) The cases believed to sustain said jurisdiction are as follows: *Thomson Spot Welder Company v. Ford Motor Company (1923), 265 U. S. 445, 68 L. Ed. 1098; Forsyth v. Hammond (1896), 166 U. S. 506, 41 L. Ed. 1095; International Railway Company v. Davidson (1921), 257 U. S. 506, 66 L. Ed. 341.*

III.

STATEMENT OF THE CASE.

The facts of the case have been stated in Subdivision I of the preceding petition, pages 2 to 5, inclusive, which Subdivision I is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in determining that the market value at the time of receipt of the 4,989 shares of stock which Taxpayer acquired under his agreement to purchase the same constituted compensation for services.

(2) The Circuit Court of Appeals erred in misconstruing Taxpayer's agreement with Kelvinator Corporation so as to disregard portions of such agreement and render portions thereof useless and inexplicable.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A.

The Circuit Court of Appeals, in determining that the market value of the stock so purchased at the time of receipt constituted compensation for services, has rendered a decision directly in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Omaha National Bank v. Commissioner (1935), 75 Fed. (2d) 434.*

Point B.

The Circuit Court of Appeals, in construing Taxpayer's contract to provide that the market value of the stock purchased thereunder, at the time of receipt, constituted compensation for services, has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the Board of Tax Appeals as to call for an exercise of this court's power of supervision.

Point C.

The Circuit Court of Appeals, in determining that the market value of the stock so purchased at the time of receipt constituted compensation for services, has decided an important question of federal law which has not been, but should be, settled by this court.

POINT A.

The Circuit Court of Appeals, in determining that the market value of the stock so purchased at the time of receipt constituted compensation for services, has rendered a decision directly in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Omaha National Bank v. Commissioner (1935), 75 Fed. (2d) 434.*

In the *Omaha National Bank case* an employee of Deere & Company, on November 1, 1911, entered into a combination employment-stock purchase contract with his employer which set forth the terms of his employment over a three-year period at a salary of $5,000.00 annually. In the same contract the employee agreed to purchase stock of the employer corporation under the following provision:

> "Third. *In further consideration of the services so to be rendered by the party of the third part,* the party of the first part agrees to sell, and the party of the third part agrees to buy, all upon the terms and conditions hereinafter set forth, five hundred (500) shares of the common capital stock of the first party, at an agreed price of $50.00 per share * * *." (Italics ours.)

On April 8, 1914, modifications of the foregoing contract were made which are not pertinent to this brief. The agreement of November 1, 1911, was subsequently further modified by another agreement dated April 8, 1918, between the employer, Deere & Company, as first

party, and the employee, as second party, which agreement provided:

> "That a contract between said parties, bearing date of November 1, 1911, and subsequently modified, is now further modified as follows*:
>
> * * *
>
> '3. The first party now agrees to sell and the second party to buy 500 shares of said Deere & Company's common stock of the par value of $100.00 per share, at $50.00 per share, upon the following terms and conditions:
>
> '(a) Said stock shall be paid for (except as hereinafter provided) by first party crediting upon the purchase price thereof, a sum equivalent to the dividends which may be declared upon a like number of shares of Deere & Company's outstanding common stock.
>
> '(b) When the credits so to be made shall equal the sum of $25,000.00, the said stock shall be delivered to the second party, but if the credits do not amount to $25,000.00 by June 1, 1925, the second party shall be entitled to receive, and there shall be delivered to him, 100 shares of said stock; and if by June 1, 1928, the said credits do not amount to the purchase price of the remainder of the stock covered by said contract, the second party shall be entitled to receive, and there shall be delivered to him, 150 shares of said stock in addition to the 100 shares previously delivered, as herein provided. In either or both cases, i. e., on stock delivered in 1925 or 1928, the first party shall credit the second party with the difference between the sum of $50.00 per share and the credits actually made thereon.' "

---

*This introductory provision was taken from the transcript of the record which we have secured from the attorneys for the petitioner in the *Omaha National Bank case*. The remaining facts in the *Omaha National Bank case* discussed in this brief are found in the opinions of the Board (29 B. T. A. 819) and the court.

The case involved the taxable gain realized by the employee upon receipt of the 150 shares which he had acquired on June 1, 1928, by reason of a $225.00 dividend credit and a further credit of $7,275.00 under paragraph 3 (b) to make up the $7,500.00 purchase price.

The Commissioner contended that the market value of the stock on June 1, 1928, was compensation for services and therefore taxable income. The court held: (1) that the credit of $7,500.00, consisting of the $225.00 dividend credit and the $7,275.00 credit to make up the balance of the purchase price, constituted compensation for services; and (2) that the stock which the taxpayer was obligated to take in lieu of the $7,500.00 credit was purchased by the taxpayer under the terms of his contract and its market value at the time of receipt did not constitute compensation for services rendered.

The following quotations from the *Omaha National Bank case* are directly applicable to the proceedings at bar:

> "The Board was entirely justified in finding that whatever gain the taxpayer actually realized in 1928 from the contract with his employer was additional compensation for his services, but we are unable to avoid the conclusion that the realized gain was to be measured by what the employer credited the taxpayer with upon his stock purchase contract, and not by the market value of the stock delivered to him. * * *
>
> The Commissioner and the Board have treated the transaction here involved as one in which the company in 1928 delivered 150 shares of stock to the taxpayer as additional compensation for services. They have disregarded the contract. The additional compensation which the taxpayer received was what

he contracted for in 1918 and was the amount credited to him by his employer and with which he paid for the 150 shares of the 500 shares which he agreed to purchase. The difference between the amount of the credit and the fair market price of the stock was not a taxable gain realized in the year 1928, since the stock was not sold by the taxpayer in that year.

Concededly, if the company had, without any previous agreement or understanding, credited the taxpayer with $7,500 and delivered to him the 150 shares of stock as additional compensation for his services, the realized gain would be the fair market value of the stock. * * * But where the stock was delivered under contract of purchase and the taxpayer became the owner of it because of his agreement to purchase, the difference between what he paid for the stock and what the stock was worth was not a taxable gain. * * * It would become a taxable gain in the year that the stock was sold by the taxpayer, provided that the gain had not evaporated by that time.

* * * In this case the employee paid for his stock out of additional compensation contracted for in 1918 for the very purpose of enabling him to pay for at least 250 of the 500 shares by June 1, 1928. There is not the slightest claim or suggestion that at any time the taxpayer and the company acted otherwise than in the best of faith, or that there was any thought on the part of either of avoiding or evading any taxing statute."

It should be noted that in the *Omaha National Bank case* the contract of August 8, 1918, merely modified the November 1, 1911, contract, the 1911 contract prescribing the terms of the employment relationship and also providing for the sale of the stock. For that reason we have an employment agreement and a stock purchase agreement both embodied in one contract. Moreover, the

modified contract provides that on June 1, 1925, the employee shall receive a credit sufficient to pay for 100 shares and that such shares shall be delivered to the employee on that day, and that on June 1, 1928, the employee shall receive a credit to pay for 150 shares and such shares shall be delivered to the employee on that day. There is no question but what these credits constituted compensation for services and the court so held. However, the employee received nothing but stock for such services under the terms of his contract and yet the court determined that such stock was purchased by the employee and not received as compensation for services.

In both the *Mason case* and the *Omaha National Bank case* we have the following elements:

(1) An employment agreement providing among other things for a fixed compensation and prescribing the terms of employment;

(2) A provision in the same agreement for additional compensation, that is, the money bonus in the *Mason case* and the credit in the *Omaha National Bank case;*

(3) A requirement that the amount of such additional compensation (the credit in the *Omaha case* and an amount substantially equal to the amount of the cash bonus in the *Mason case)* be exchanged for stock in the employer company at a fixed price per share on the same day such compensation is received or credited (R. 11-12).

In the proceedings at bar the Circuit Court of Appeals attempted to distinguish the *Omaha National Bank case* on its facts. The distinctions were without foundation under the facts and were of no consequence, even

if they had existed. We believe that we have fully answered these purported distinctions in our petition for rehearing which appears on pages 63 to 75 of the record in this case. If the court believes that there is any merit in such distinctions, petitioners would appreciate this court's considering the matters discussed in the petition for rehearing. We also show in such petition that the facts in the *Omaha case* were far less favorable to the taxpayer than in the proceedings at bar.

POINT B.

The Circuit Court of Appeals, in construing taxpayer's contract to provide that the market value of the stock purchased thereunder, at the time of receipt, constituted compensation for services, has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the Board of Tax Appeals as to call for an exercise of this court's power of supervision.

We have a situation where under the stipulated facts of the case Kelvinator Corporation agreed to sell and Taxpayer agreed to purchase certain stock, there being no evidence that such stock was not sold for a fair price and no evidence that the parties did anything other than what they agreed to do, it being stipulated that taxpayer acquired the stock "pursuant to Section 3" of the contract (R. 10-11). The result of the court's decision is that, if any taxpayer enters into a contract to purchase stock from his employer at a fixed fair price per share, using funds derived from any source but in an amount equal to a portion of his compensation payable at the

date of the purchase, he will be taxed not on the amount of his compensation agreed upon in his contract, but on the market value of the shares at the time of receipt, even though the market value at the time of receipt could not be determined at the time the contract was made. If the courts are permitted to so construe a contract, disregarding portions of it and rendering them useless or inexplicable, then the intent of the parties to such a contract is wholly disregarded and the compensation to be received by the employee is determined to be an amount which neither he nor his employer intended. If the Circuit Court of Appeal's construction is carried to its logical conclusion and the market value of the stock at the time of receipt is less than the agreed fixed purchase price, then the tax should be based upon such lesser price. We believe that the contract has been so misconstrued that it can be said that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the Board of Tax Appeals as to call for an exercise of this court's power of supervision.

POINT C.

The Circuit Court of Appeals, in determining that the market value of the stock so purchased at the time of receipt constituted compensation for services, has decided an important question of federal law which has not been, but should be, settled by this court.

As indicated by Point B, the court's misconstruction of the contract in question has a far-reaching effect on all contracts made by taxpayers for purchases of stock

from their employers. We believe that the Circuit Court of Appeals in this case has incorrectly decided an important question of federal tax law which has not been, but should be, settled by this court. In our opinion the question is one of "genuine, intrinsic, public significance."

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

COOK, SMITH, JACOBS and BEAKE,
VICTOR C. SWEARINGEN,
Counsel for Petitioners.

Dated July 31, 1942.

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CITATIONS

Cases:

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Omaha National Bank v. *Commissioner*, 75 F. (2d) 434 — 7

Robinson v. *Commissioner*, 59 F. (2d) 1008 — 7

Rodrigues v. *Edwards*, 40 F. (2d) 408 — 7

Statute:

Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 22 — 2

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479352—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 282

GEORGE W. MASON AND HAZEL B. MASON, HIS WIFE, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 15–22) is reported at 41 B. T. A. 1287. The opinion of the Circuit Court of Appeals (R. 58–61) is reported at 125 F. (2d) 540.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on January 14, 1942 (R. 57), and its order denying the petitioners' petition for rehearing (R. 63–75) was entered on

March 6, 1942 (R. 77). Two orders extending the time to file the petition for a writ of certiorari having been granted by this Court (R. 78), the petition was filed on August 5, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer [1] entered into a contract of employment with the Kelvinator Corporation providing, together with other compensation, a bonus, measured in money, computed on the net earnings of the employer, but with a further provision obligating the taxpayer to exchange the bonus money, immediately upon receipt, for stock of the employing company at a fixed value. The market value of the stock thus received by the taxpayer in 1935 was considerably in excess of the "bonus money."

The question presented is whether the taxpayer realized taxable income in the amount of the "bonus money" or in the amount of the fair market value of the stock.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in

[1] The word "taxpayer," wherever used herein, refers to petitioner, George W. Mason.

> whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> ART. 22 (a)–3. Compensation paid other *than in cash*.—If services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. If a corporation transfers to its employees its own stock as compensation for services rendered by the employee, the amount of such compensation to be included in the gross income of the employee is the fair market value of the stock at the time of the transfer. * * *

STATEMENT

The facts as stipulated (R. 9–15), and as found by the Board of Tax Appeals (R. 16–20), are substantially as follows:

The taxpayer and his wife filed a joint return for the taxable year 1935. On September 7, 1933, the

taxpayer entered into a four-year contract with the Kelvinator Corporation (hereafter called the corporation), effective October 1, 1933, superseding and terminating as of the latter date a previous contract of employment dated March 14, 1931, which would otherwise have expired on December 10, 1934. The new contract of employment [2] provided, in substance, that the taxpayer's regular, fixed rate of compensation should be (1) $50,000 annually; (2) 1,250 shares of the corporation's fully paid stock, and (R. 11–12):

> (3) The corporation further agrees as further compensation to Mason to pay him on January 15, 1935, 1936, 1937 and 1938, a sum equal to ten per cent (10%) of the net earnings of the preceding fiscal year, determined as hereinafter set forth after deducting therefrom an amount equal to five per cent (5%) upon the capital and surplus of the corporation determined as hereinafter set forth. The corporation agrees to sell and Mason agrees to purchase at ten dollars ($10.00) per share on January 15th of each year as above set forth a number of shares of fully paid stock of the corporation equal to the sum, if any, payable to Mason on such date pursuant to the preceding section of this paragraph (3); provided, that hereunder the corporation will not pay in

[2] Only the material portions of the contract are summarized here. The provisions of the contract in its entirety are set forth in the stipulation of facts (R. 10–15), and in the Board's opinion (R. 16–20).

> excess of $400,000 nor may Mason purchase in excess of 40,000 shares of such stock during the term of the contract; and provided further that the corporation will not pay in excess of $100,000 nor may Mason purchase in excess of 10,000 shares of such stock in any one year except that (a) for any year of this contract the corporation may and will pay Mason such an amount as will make the total payment to Mason under this paragraph (3) $100,000 per annum for each year of this contract theretofore expired in case 10% of the net earnings since October 1, 1933, computed under the formula therein set forth shall equal or exceed $100,000 per annum for the years already expired and (b) Mason may and will purchase such number of shares as will make the total number of shares purchased by him under this paragraph at $10.00 per share equal the amount paid him under the above exception (a).

The amount determined as payable to the taxpayer on January 15, 1935, computed upon net earnings of the corporation for the preceding year under Paragraph (3) of the contract, was $49,891.60. Pursuant to the provisions of that Paragraph, he acquired 4,989 shares of the capital stock of Kelvinator Corporation on that date, having a then fair market value of $84,189.38. On September 7, 1933, when the above contract was executed, the stock in question had a fair market value of $11.4375 per share. The taxpayer devoted his entire time to the affairs of Kelvinator Cor-

poration during the taxable year. (R. 20.)

In making their return for the calendar year 1935, the taxpayer and his wife included in income the amount of $49,891.69. In determining the deficiency the Commissioner increased the reported income by the difference between this amount and $84,189.38, the fair market value of the stock acquired. (R. 20.)

On the basis of these facts, the Board held that the taxpayer realized taxable income in the amount of the fair market value of the stock when received in the taxable year 1935 (R. 22). The court below affirmed (R. 58–61).

ARGUMENT

The issue in this case is whether the stock in question was received by petitioner as compensation for services. Under the contract the company agreed to pay him as a bonus on January 15 of each year 10% of its net earnings, and he agreed to purchase on the same day, at $10 a share, the number of shares of stock "equal to the sum" payableto him. The record does not disclose whether the company and petitioner actually went through the ritual of handing the price of the shares back and forth. Whether they did or not, the net result, as intended by the parties, was that at the close of the day petitioner had received as compensation for services, and there-

fore as income, stock worth more than $10 per share. The measure of such compensation, under the statute and regulations (see pp. 2–3, *supra*), is the fair market value of the stock at the time of transfer. The decision below is thus plainly correct, and is in accord with established principles. ~~*Cf. Olson* v. *Commissioner*, 67 F. (2d) 726 (C. C.~~ Cf. *Olson* v. *Commissioner*, 67 F. (2d) 726 (C. C. A. 7), certiorari denied, 292 U. S. 637; *Robinson* v. *Commissioner*, 59 F. (2d) 1008 (C. C. A. 6); *Rodrigues* v. *Edwards*, 40 F. (2d) 408 (C. C. A. 2).

Petitioner contends that the decision below conflicts with *Omaha National Bank* v. *Commissioner*, 75 F. (2d) 434 (C. C. A. 8). There is language in that opinion which seems unduly to sanctify the formal terms of the contract. But the purchase of stock in that case was separable from the credit or bonus granted the taxpayer by his employer. The taxpayer could pay for the stock independently of such credits; he was entitled to delivery "whenever he paid the difference between the credits and the purchase price" (p. 434). This provision may have been sufficient to justify characterizing the entire contract as one of purchase and sale, even in so far as the stock acquired through company credits was concerned. Accordingly the court below here held the *Omaha National Bank* case to be distinguishable (R. 60).

CONCLUSION

The decision of the court below is in accord with established principles. There is no conflict and the petition should be denied.

Respectfully submitted.

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